

Yasgur v 17 Battery Assoc. LLC

2010 NY Slip Op 34035(U)

October 1, 2010

Supreme Court, New York County

Docket Number: 603650/09

Judge: Barbara R. Kapnick

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**SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 39**

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JOSEPH YASGUR and JOSEPH GERSHENOV,

Plaintiffs,

- against -

17 BATTERY ASSOCIATES LLC, 17
DIAMOND CORP., PV REALTY LLC, ALLEN
GROSS a/k/a ALLEN I. GROSS, EDITH
GROSS, GFI CAPITAL RESOURCES GROUP,
INC., and GFI MANAGEMENT SERVICES INC.,

Defendants.
-----x

BARBARA R. KAPNICK, J.:

Background

On December 17, 1999, plaintiffs Joseph Yasgur and Joseph Gershenov entered into a Nominee Agreement (the "Contract") with defendant 17 Battery Associates LLC ("17 Battery") pursuant to which plaintiffs agreed to serve as nominees to facilitate 17 Battery in acquiring 77 condominium units in a residential condominium building known as the Parc Vendome Condominium, located at 340 West 57th Street, 350 West 57th Street, 333 West 56th Street and 353 West 56th Street. According to the Complaint, plaintiffs and 17 Battery agreed that the acquisition was to be effected through defendant PV Realty LLC ("PV") which was intended to serve as the purchasing entity of the 77 condominium units. Plaintiffs allege that the Contract vested plaintiffs with nominee status in connection with all aspects of 17 Battery's ultimate acquisition of the condominium units.

In exchange for plaintiffs' agreeing to serve in the nominee capacity for the benefit of 17 Battery, the contracting parties agreed to the following terms of compensation as set forth in paragraph 4 of the Contract:

For Nominee's services under this Agreement, 17 Battery shall pay to Nominee a fee of ... (\$250,000) on January 10, 2000 plus 20% of the net profits in excess of \$13,500,000 from the sale of the condominium units as, if and when such net profits are distributed. Net profits shall be determined by subtracting from the sales price, in the aggregate, of all of the units all costs and expenses of the sale of the condominium units, including but not limited to, invested capital, broker commissions, attorneys fees, accountant and professional fees, management fees and any special promotes or syndication fees paid to investors or third parties (emphasis supplied).

Plaintiffs allege that 44 of the 77 units have been sold and that the net sales aggregate a total net profit of \$19,602,245.25, which exceeds the required \$13,500,000.00 by \$6,102,245.00, and thus that plaintiffs are entitled, at a bare minimum, to 20% of the \$6,102,245.00 which equals \$1,220,449.05.

The Complaint

Plaintiffs brought this Complaint setting forth eighteen causes of action. The first cause of action is against 17 Battery for breach of the Contract based on its alleged failure to pay plaintiffs any portion of the net profits received by 17 Battery so far. The second through seventh causes of action are against each

of the non-contracting defendants for tortious interference with the Contract between plaintiffs and 17 Battery. The eighth through thirteenth causes of action allege that the non-contracting defendants have been unjustly enriched by virtue of their receipt of money from 17 Battery to which plaintiffs are allegedly entitled.

The fourteenth cause of action is for a full accounting from 17 Battery of all income, sales, revenue, and costs entailed in any and all sales of the condominium units subject to the Contract in order to ascertain the exact amount 17 Battery owes to the plaintiffs. The fifteenth cause of action is for a declaratory judgment as against all the defendants declaring that plaintiffs are entitled to 20% of the net profits in excess of \$13,500,000 from future sales of the condominium units at such time as the profits are distributed. The sixteenth through eighteenth causes of action are for fees and costs associated with this legal matter against 17 Battery, Allen Gross and Edith Gross, respectively.

The Motion

Defendants now move pursuant to CPLR 3211 (a) (1) and (a) (7) to dismiss the Complaint in its entirety based upon documentary evidence and for plaintiffs' failure to state a claim. Those portions of the motion seeking to dismiss the second through

seventh causes of action for tortious interference with contract were granted on the record on July 14, 2010, as was that portion of defendants' motion seeking to dismiss plaintiffs' fifteenth cause of action for a declaratory judgment. See *Apple Records v Capitol Records*, 137 AD2d 50,54 (1st Dep't 1988).

Breach of Contract

17 Battery moves to dismiss the first cause of action for breach of contract, on the grounds that it is premature since only 44 of the 77 units have been sold, and thus the "net profits", as defined in the Contract, cannot be calculated now.

Plaintiffs argue that 17 Battery was obligated to pay plaintiffs 20% of the "net profits" from the sale of the units once the sales exceeded \$13,500,000, which they have. At the very least, plaintiffs argue that the payment language in Paragraph 4 of the Contract is ambiguous as to when defendant 17 Battery must begin making payment, and thus defendant's motion to dismiss this cause of action must be denied.

Finally, plaintiffs contend that even under defendant's interpretation of the Contract language, the motion should be denied to permit plaintiff an opportunity to conduct discovery to determine whether the defendants' failure to have sold all the

units for over ten years was in any way caused by defendants' bad faith conduct.

Both parties argue extensively about the meaning of the one sentence in Paragraph 4 which reads in relevant part that "[n]et profits shall be determined by subtracting from the sales price, in the aggregate, of all of the units all costs and expenses of the sale of the condominium units ... " and speculate as to the reason why certain language was or was not included in that sentence. Plaintiffs contend that the language of this sentence does not create a condition precedent preventing plaintiffs from receiving their 20% share of net profits until after all the units have been sold, relying on the case of *Long Is. Sav. Bank v Geloda/Briarwood Corp.*, 190 AD2d 64 (1st Dep't 1993).

Based on the papers submitted, including the parties' Memoranda of Law, and after hearing oral argument on the record on July 14, 2010, this Court finds that the Contract language on its face is reasonably susceptible to more than one interpretation. It is unclear what the intention of the parties was, and whether 17 Battery had the obligation to begin to pay plaintiffs when the profits received were greater than \$13,500,000 or if the obligation did not begin until all 77 units were sold, no matter how long that might be. Therefore, that portion of the motion seeking to dismiss plaintiffs' first cause of action is denied.

Accounting

The defendants next argue that the fourteenth cause of action seeking a full accounting should be dismissed because the net profits cannot be calculated until all 77 of the units have been sold, and thus this cause of action is premature.

However, since this Court has already denied that portion of defendants' motion seeking to dismiss plaintiffs' first cause of action for breach of contract, dismissal of this cause of action would be premature.

Unjust Enrichment

"A cause of action for unjust enrichment is stated where 'plaintiffs have properly asserted that a benefit was bestowed ... by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs therefor' (*Tarrytown House Condominiums v Hainje*, 161 AD2d 310, 313)." *Weiner v Lazard Freres & Co.*, 241 AD2d 114, 119 (1st Dep't 1998).

Plaintiffs allege in the Complaint that the non-contracting parties were unjustly enriched by the transfer of funds from 17 Battery to the non-contracting defendants to the exclusion of the plaintiffs.

However, there is no allegation in the Complaint that any benefit was conferred upon the non-contracting parties by the

plaintiffs herein, which is an essential element of an unjust enrichment claim.

Accordingly, that portion of the motion seeking to dismiss plaintiffs' eighth through thirteenth causes of action for unjust enrichment against the non-contracting defendants is granted.

Costs

Since the defendants did not specifically address the sixteenth through eighteenth causes of action for fees and costs, this Court will not address them at this time.

The remaining defendants shall file and serve Answers to the remaining causes of action (i.e., the first, fourteenth, sixteenth, seventeenth and eighteenth causes of action) within 30 days after entry of this Order.

Counsel shall appear for a preliminary conference in IA Part 39, 60 Centre Street, Room 208 on December 1, 2010 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: October / , 2010



BARBARA R. KAPNICK
J.S.C.

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